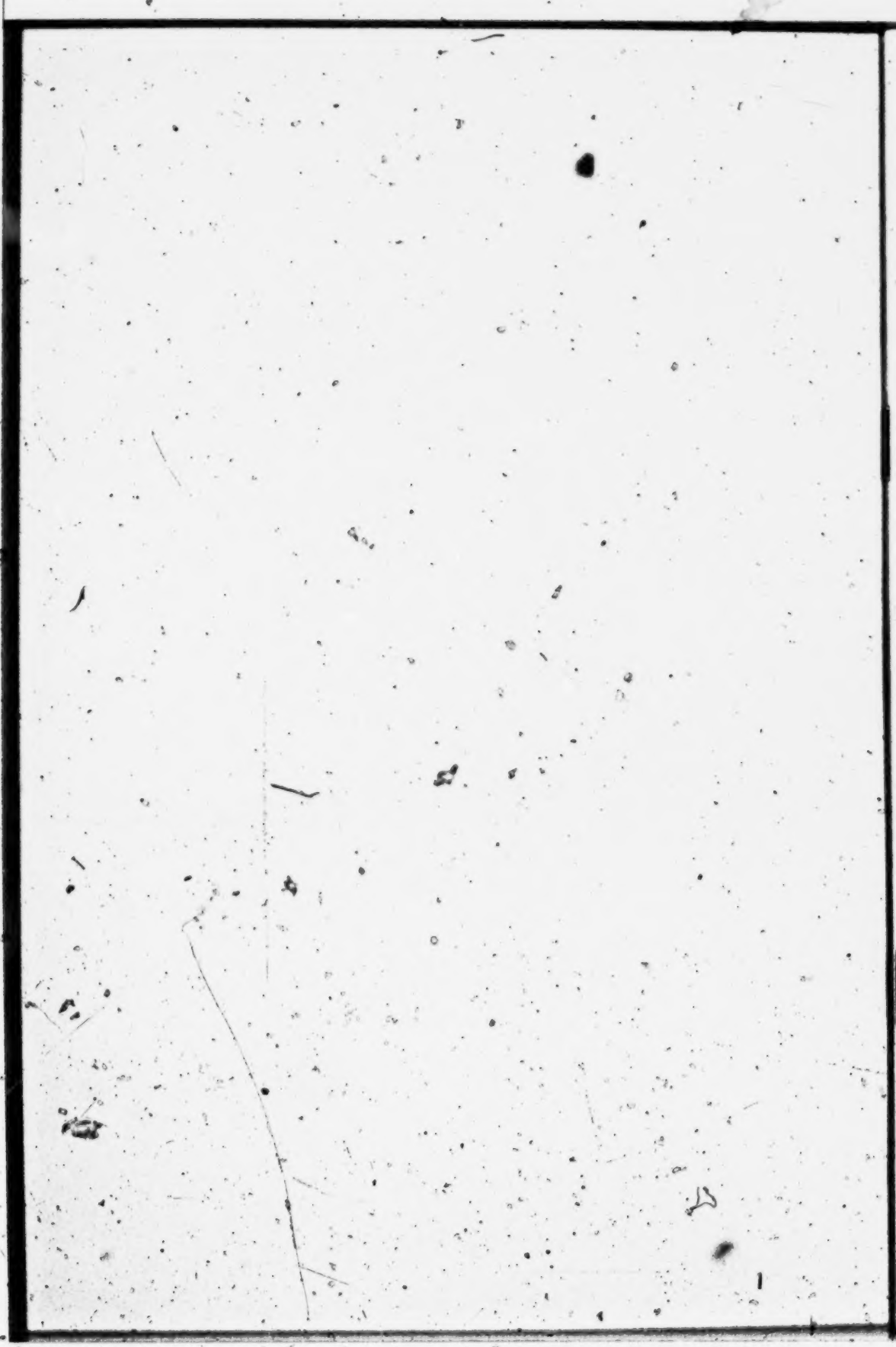

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IN THE

Supreme Court of the United States

October Term, 1965

No. 21

ALLEN COBERT,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Court of Appeals of the State of New York, to review a decision of that court, entered April 15, 1965, affirming by a divided court the judgment of the Criminal Court of the City of New York, New York County, rendered on January 30, 1964, convicting the petitioner, after trial, of violating Section 1141 of the New York Penal Law (SELLING

AND OFFERING TO SELL OBSCENE PRINTS AND ARTICLES). On October 29, 1964, the Appellate Term of the Supreme Court, First Department, had modified the judgment of conviction by reducing the petitioner's sentence from one year plus a fine of $500 or 90 days given on the first count of the information to 60 days in the penitentiary plus a $500 fine or, in lieu thereof, 60 days' imprisonment, and by reducing each of the sentences given on the remaining two counts under which he was convicted—the second and sixth counts of the information—from one year to 60 days in jail; all sentences to run concurrently.

Questions Presented

1. Whether the films designated People's Exhibits 1, 2 and 6 are obscene.

2. Whether the People have the burden of establishing, beyond merely offering the articles which are the subject of the prosecution into evidence, what is offensive to contemporary community standards; a constitutional test to be applied in the determination of the issue of obscenity.

3. Whether there was sufficient proof on the issue of *scienter*.

The Statute Involved

Penal Law Section 1141 reads in pertinent part:

"1. A person who sells, lends, gives away, distributes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with in-

tent to sell, lend, distribute, give away, show or transmute, * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting * * * motion picture film * * * which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character; * * *

"Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than one hundred fifty dollars nor more than two thousand dollars or both fine and imprisonment for the first offense * * *.

"4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section."

Statement of Facts

The petitioner was tried under a six-count information, the first count charging him with the sale of an obscene motion picture film, and the remaining five counts charging him with possessing, with the intent to sell, five other obscene motion picture films.

The only witness who testified at the petitioner's trial was the arresting officer, Patrolman Walter Szachacz. Szachacz testified that on July 17, 1963, at the premises 115 West 30th Street, Room 402, occupied by Allen Enterprises, Inc., he introduced himself to the petitioner as being from the Art League Association and stated that he wanted certain nude pictures enlarged so that his students could

project the prints and use them as models. After some discussion, the petitioner suggested that three-dimensional slides of nude women would be more appropriate for the drawing of the human body. Szachacz said he would take the matter up with the other members of the Association and left (8-9).* On July 19, 1963, Szachacz returned to the premises and agreed to purchase 100 three-dimensional slides of nude women and ten hand viewers. He told the petitioner that if student reaction was favorable, he would purchase an additional 900 slides. He picked up the slides and viewers on July 22, 1963, and paid for the order in cash (10-11).

On the following day, Szachacz called the petitioner and stated that the students were satisfied with the slides, and that in order to raise money for the 900 additional slides, he was going to throw a party over the weekend. Szachacz told the petitioner that he would like to get some "bachelor-type films" to show at this party. The petitioner stated that he didn't think he had available what Szachacz wanted, but that he did have other art films Szachacz might be interested in. On the 25th day of July, the patrolman went to the petitioner's office (11-12). The petitioner greeted him as he walked in, and then went over to a chair and zipped open a blue valise. The petitioner took out of the valise a package of six white boxes, removed a rubber-band and selected one of the boxes, called his secretary over and said, "Here, give him the film." The secretary came over to Szachacz and said, "That would be five dollars for the film and twenty cents tax." Szachacz took the film, paid the money and stated that if the film was what he

* Unless otherwise specified, all references are to the Record on Appeal.

wanted he would return and purchase the other five films. He then left the office (13-14).

Later that same day, Szachacz returned to the petitioner's office, identified himself as a police officer and told the petitioner he was under arrest for selling pornographic film. Szachacz then went over to the chair where he had previously seen the petitioner unzip the blue valise and remove from the valise, which was still open, the other five boxes of film (15-16).

The white box and the enclosed film which had been sold to the patrolman, entitled "June Palmer, #2," were collectively put into evidence as People's Exhibit 1 (19). The other five rolls of film entitled, "M. Jordan," "B. Logan," "Karen Palmer," "Lorraine Burnett" and "Jayne Tracy" were put into evidence as People's Exhibits 2, 3, 4, 5 and 6 respectively (21-3). All the exhibits were viewed by the three trial judges in chambers (52-3). The court found that the three films marked People's Exhibits 1, 2 and 6 were obscene, and convicted the petitioner under the three corresponding counts in the information (57).

The Appellate Term of the Supreme Court, First Department, although reducing the sentences imposed, affirmed, as modified, the judgment of conviction on October 29, 1964. The Court of Appeals affirmed the judgment, without opinion, on April 15, 1965, and denied the petitioner's motion for leave to reargue on June 10, 1965.

Before examining the six films listed in the six counts of the information, the Court of Appeals had the films

spliced together and placed on one reel. As a result of error, the films were not spliced in the order in which they were received in evidence. The order in which the films now appear on the reel is as follows: Exhibits 1, 5, 3, 4, 2 and 6. The order in which the films were marked as exhibits correspond with the numbers of the counts of the information.

ARGUMENT

POINT I

The motion picture films designated as Exhibits 1, 2 and 6 are obscene and the element of *scienter* was proved beyond a reasonable doubt.

The conviction for violating Section 1141 of the Penal Law was predicated upon the sale of a box of film by the petitioner to the police officer, and on the petitioner's possession of five other boxes of film for the purpose of sale. It is urged by the petitioner that the three films upon which he was convicted are in fact and law not obscene, and that the necessary proof of current community standards and of *scienter* is lacking. However, examination of the three films involved and of the photograph on the box of the film sold, adequately refutes these arguments.

Element of Obscenity

Each of the films in question is an 8 mm. color production which reveals a woman lounging upon and strutting around a bed or sofa, assuming various contrived poses to accentuate her naked breasts and buttocks, which at times

are even more emphasized by vigorous and unnatural gyrations. In two of the films, People's Exhibits 1 and 6, the women perform naked, and although in much of the footage the pubic area is covered by the strategic placement of hands and thighs, portions of that region are at times visible to the viewer. In People's Exhibit 2 the woman wears a brief covering over her pubic area.' The only purpose of these patently offensive films, which have no possible social or artistic value, is to appeal to the viewer's prurient interest, and the trial court as well as the Court of Appeals were justified in determining that these films are obscene.

The petitioner not only contests the trial court's ultimate determination on the issue of obscenity, but argues that the judgment must be set aside simply because the People failed to present any evidence on the question of what is offensive to contemporary community standards; one of the constitutional tests to be applied in determining what constitutes obscenity.

This Court in *Roth* v. *United States,* 354 U. S. 476 (1957), endorsed as a test of obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests" [*id.* at 489]. Moreover, it was held that the material must be utterly without social importance and patently offensive in that it goes substantially beyond customary limits of candor in representing sexual matters [*id.* at 484; *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482-6]. All of these standards were recently reaffirmed by this Court in *Jacobellis* v. *Ohio,* 378 U. S. 184, 191-2 (1964).

There are actually three separate standards upon which constitutional protection rests, any one of which can support the lawful dissemination of material. Each standard must necessarily be judged by a different litmus independently of each other. Due to the fact that subtle artistic merit is sometimes beyond the aesthetic appreciation of the average man, the standard of redeeming social value must be judged by the courts, perhaps with the aid of experts and critics. "Appeal to the prurient interest" must be taken quite literally and alone, and must be judged in terms of the susceptibility of those the material is likely to reach. Patent offensiveness must be evaluated in terms of contemporary community standards, and this is the domain of the average man who is most expressive and understanding of the community's tolerance. Surely the trier of fact, whether it be court or jury, is competent, without the assistance of the prosecution, to determine the community's current attitudes on what is patently offensive by applying common sense, experience and the knowledge which comes from being a member of the community. These points are all presently before this Court in *Mishkin* v. *New York*, #49 Oct. 1965 Term.

There is nothing in the concurring opinions of Justices FRANKFURTER and HARLAN in *Smith* v. *California*, 361 U. S. 147, 164-7, 171-2 (1959), which would necessitate the conclusion that the People have the burden of presenting proof on what is offensive to current community standards. Both opinions are concerned only with upholding the right of the defendant to offer evidence on the issue of what is within the community's concept of permissible candor, and do not attempt to impose a burden of proof upon the prosecution. This was made clear by Justice HARLAN when he stated:

"While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff all efforts to enlighten or persuade the trier" [*Smith* v. *California*, 361 U. S. at 172].

Nor does the recent decision of Judge Moore in *United States* v. *Klaw* (decided July 15, 1965) —— F. 2d —— (2d Cir.) Docket page 2758, compel the acceptance of the petitioner's argument. The *Klaw* case held that the conviction for the circulation of sado-masochistic literature alleged to appeal to the prurient interests of the deviate must be reversed because there was nothing presented to the jury which would enlighten them as to the nature of the appeal of the "bondage" material. This holding, which goes far beyond any pronouncements of this Court, is clearly not the law in New York. Moreover, the opinion is confined to the question of the prosecution's responsibility of proving the prurient appeal of the atypical material there involved, and is not concerned with the issue of contemporary community standards.

Element of *Scienter*

A conviction under Section 1141 cannot be upheld without proof of the element of *scienter* [*People* v. *Finkelstein*, 9 N. Y. 2d 342 (1961)], and the petitioner contends that *scienter* was not established by the evidence presented at his trial. The cases which have considered this issue, however, have repeatedly found circumstantial evidence of the quality introduced in the instant case to be sufficient.

The films were each packaged in a 3-inch by 3-inch white cardboard box, the cover of the box sold to the police officer contains a black and white picture of the woman depicted in the film, emphasizing her naked breasts in a sexually suggestive pose (Exh. 1). The officer told the petitioner that he wanted some "bachelor-type films." The petitioner stated he didn't have what the officer wanted, but that he did have other "art" films the officer might be interested in. The six films itnroduced at the trial were the films offered by the petitioner to satisfy the officer's explicit request.

In *Smith* v. *California,* 361 U. S. 147 (1959), this Court, in discussing the constitutionality of an obscenity statute, defined *scienter* as "knowledge by * * * [defendants] of the contents of the books," and stated that circumstances might warrant the inference that the seller was aware of the contents of a book despite his denial of knowledge. In *People* v. *Finkelstein,* 11 N. Y. 2d 300 (1962), the New York Court of Appeals, following *Smith,* cited several factors which may be used to infer the necessary element of *scienter,* among them being the covers of the books in question.

The picture on the box of film sold to the officer certainly must have apprised the petitioner of the nature of its contents. Moreover, the petitioner was aware of the type of films the officer wanted and told him that the films he was offering to sell might satisfy the officer's interest. Even the petitioner's denial to the officer at the time of his arrest when he said that the films were not pornographic (15), plainly indicates knowledge of the films' content. Clearly under these circumstances, the court was perfectly correct in inferring that the petitioner was fully cognizant

of the subject matter of the films for which he was convicted, and the establishment of that fact is sufficient to prove the essential element of *scienter* [*Smith* v. *California,* 361 U. S. at 149; *People* v. *Finkelstein,* 11 N. Y. 2d at 304]. To accept the petitioner's contention that *scienter* may only be established by proving that the accused in an obscenity case personally believes the articles involved are obscene, would render all obscenity convictions dependent upon the subjective opinion of those prosecuted, and would nullify the test of current community standards. This point, too, is presented by the *Mishkin* case, *supra.*

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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October, 1965

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

COBERT *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 21. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Court of Appeals of New York is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN would affirm.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.